Jurors in GAF Trial Say Six of 12 Favored Acquittal

By Alex Hagerty
Staff Reporter of The Wall Street Journal

NEW YORK—Six of the 12 jurors in the GAF stock-manipulation trial believed the defendants were not guilty, according to jurors interviewed since the case ended in a mistrial two weeks ago.

The jurors' comments regarding deliberations in the trial of GAF Corp. and its vice chairman, James T. Sherwin, seemed to contradict a top prosecutor's statement after the deadlock resulted in the mistrial. Bruce Baird, head of the Manhattan U.S. attorney's securities fraud division, was quoted at the time saying he believed a majority had favored conviction.

The jurors' comments appear to indicate the government's case against GAF may not be as strong as many previously believed. Said one of the jurors, Helen Robinette: "It was not only that the government did not convince me of (Mr. Sherwin's) guilt beyond a reasonable doubt. In the end I believed that Mr. Sherwin was innocent."

Defense lawyers declined to comment on the jurors statements, as did Mr. Baird. He did confirm, however, that the government is preparing to retry the case as soon as possible and expects U.S. District Judge Mary Johnson Lowe to decide on a starting date by the end of this week.

Last July, the government charged GAF, a Wayne, N.J., specialty chemical maker, and Mr. Sherwin with illegally trying to manipulate the common stock of Union Carbide Corp. in advance of GAF's sale of a large block of stock in November 1986. The eight-count indictment included charges of stock manipulation, securities fraud, wire fraud and conspiracy.

The first trial ended in a mistrial after four weeks when Judge Lowe found that a prosecutor improperly, but unintentionally, withheld a document.

Two weeks ago, Judge Lowe declared a second mistrial after most jurors said they could no longer deliberate. After meeting for 12 days, the jurors sent a note to the judge telling her they were divided three ways: guilty, not guilty and undecided. A unanimous decision is required to convict or acquit. The judge sent a note back asking if more time would be helpful. After seven jurors replied no, the judge ended the lengthy deliberations.

Because the jurors made a pact not to speak to the press, the distribution of the votes in the three-way split has remained a mystery. Yesterday, however, several jurors—representing both pro-acquittal and pro-conviction positions—said in the end, six favored acquittal, five wanted to convict and one was undecided. Another juror was less sure of the numbers but agreed there hadn't been a majority to convict.

The GAF jury's response to the evidence could mean the government has a tough battle ahead in its retrial and in cases against takeover speculator Saul P. Lewis and Singer Co. Chairman Paul Bilzerian, both indicted for securities fraud.

What links Mr. Bilzerian, Mr. Lewis and Mr. Sherwin is their principal accuser, Boyd Jefferies, the former brokerage chief who was implicated by Ivan Boesky and later helped the government bring criminal charges in all three cases. Mr. Jefferies was the government's star witness in the GAF trial and is also expected to testify in the trial of Mr. Bilzerian, scheduled for May, and at Mr. Lewis's trial in September.

After the first mistrial, which was declared Jan. 10, some jurors indicated they could not have convicted Mr. Sherwin on the basis of Mr. Jefferies's testimony.

Ms. Robinette, a juror in the second trial, said yesterday she "did not believe Mr. Jefferies's testimony." Ms. Robinette said she had been strongly influenced by the fact that Mr. Jefferies's chief trader, James Melton, had not corroborated several details in his boss's story. "The contradictions seemed almost laughable," she said.

Once during the deliberations, a straw vote by the jurors resulted in an 11-1 vote in favor of conviction, Ms. Robinette and others have confirmed. But Ms. Robinette said that tally must be considered a "tentative vote and not an indication of the jury's thinking" from then on. In fact, Ms. Robinette, who voted "guilty" that day, recalled the next day jurors were "split in three ways again."

During their 12 days of deliberations, jurors reheard the testimony of major witnesses in the cases and examined many documents. The jurors who have discussed it say it was an exhausting, sometimes agonizing experience. One juror said "there was a lot of mind-playing." This juror also said: "Toward the end, it was like a two-camp thing."

ATTACHMENT 11

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July 27, 1988

Mr. H. Walker Feaster, III

AMENDMENT

This amendment to the pending application (FCC Form 315, BTCH-880322GF and BTCH-880322GG) for authority to transfer control of GAF Corporation (GAF), the one hundred percent owner of GAF Broadcasting Company, Inc., licensee of radio station WNCN (FM), New York, New York, from the shareholders of GAF to a GAF management group led by its Chairman and Chief Executive Officer, Samuel J. Heyman, is filed to inform the Commission of a criminal indictment against GAF and its Vice Chairman, James T. Sherwin, which was handed down by a Federal grand jury in New York on July 6, 1988. The indictment alleges generally that, in the fall of 1986, GAF and Mr. Sherwin sought to manipulate the price of Union Carbide stock owned by GAF to the corporation's advantage. It is believed that an amendment to the pending application is required because Mr. Sherwin, the only individual defendant, is an officer of Newco Holdings, Inc. (Newco), and its indirect wholly owned subsidiary Dorset Inc., the proposed transferees through which the management group will acquire GAF.

Both GAF and Mr. Sherwin have pleaded not guilty to the charges against them. They will vigorously defend the case and are confident of complete vindication. Mr. Heyman and the other officers of Newco and Dorset, having informed themselves of the facts relating to the charges, share GAF's and Mr. Sherwin's confidence in this regard.

Should any additional information be required by the Commission in connection with this matter, it will be promptly furnished upon request.

Samuel J. Heyman

July 26, 1988

ATTACHMENT 12

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN REPLY REFER TO:
8920-JO

David M. Rice, Esquire
75-28 181st Street,
Flushing, New York 11366

In re: WNCN(FM), New York
GAF Broadcasting Company, Inc.
BTCH-880322GF
BTCH-880322GG

Dear Mr. Rice:

This is in reference to the Petition to Deny the above-captioned applications for consent to transfer of control filed April 27, 1988 by Listeners' Guild, Inc. ("Guild"). GAF Broadcasting Company, Inc., GAF Corporation, and Samuel J. Heyman ("Applicants") filed an Opposition to Guild's petition, to which Guild filed a Reply. [1] The first captioned application, BTCH-880322GF, was subsequently amended by a filing dated October 20, 1988.

Station WNCN(FM), New York, New York, is licensed to GAF Broadcasting, Inc. ("GAF Broadcasting"), a wholly owned subsidiary of GAF Corporation ("GAF"). According to the applications, Samuel J. Heyman ("Heyman") is GAF's Chairman, chief executive officer, and largest stockholder as well as Chairman and President of GAF Broadcasting. Heyman is also the sole stockholder, director, controlling person, and President of Newco Holdings, Inc. ("Newco"). As set forth in the application (Form 315), Newco was created expressly to acquire GAF in a buyout, or merger, by a management group headed by Heyman. Although Heyman's management group has yet to be formed, it is said that it will include current officers and employees of GAF. In sum, Applicants seek to utilize two applications to effectuate a corporate acquisition and reorganization. First, control of GAF would pass to Newco and thereby to Heyman and the management group. This would be accomplished through a proposed buyout of GAF's existing stockholders. Second, GAF, the parent corporation of the licensee, would be liquidated, and the stock of GAF Broadcasting, the licensee, transferred to Dorset, Inc. ("Dorset"), an indirect and wholly owned subsidiary of Newco. Thus, GAF Broadcasting would

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1 On August 1, 1988, Applicants wrote the Commission requesting expedited action on the pending applications. Guild wrote the Commission on August 18, 1988, responding to Applicants' letter. Although Guild stated therein that it did not object to prompt staff action, it did object to what it characterized as Heyman's effort to secure the intervention of the Chairman on the basis of a "less-than-candid" description of the proceeding and issues. On August 19, 1988, counsel for Applicants submitted a letter responding, in turn, to Guild.

be controlled and owned by Heyman and his management group through Newco and subsidiaries. [2] Guild argues that Heyman must be disqualified from serving as a Commission licensee, because he cannot be relied on to honor his

transfer and merger may lead to even more emphasis on maximizing WNCN revenues at the expense of service to the public and the future of the station.

Applicants assert that the Petition to Deny is the latest in a series of Guild attacks on WNCN licenses. According to Applicants, however, Guild now fails to raise a substantial or material question of fact warranting designation of the applications for hearing, and Guild's complaints are not cognizable in the context of the public interest. In this regard, Applicants first argue that GAF Broadcasting, in fact, has maintained a classical music format. Applicants assert that Guild actually complains about particular selections aired, the announcing style, and the manner of station promotions. Thus, Applicants state that Guild's complaints do not suggest any breach of representations to the Commission. Further, Applicants argue that, regardless, the Commission will not enforce citizens' agreements in areas not cognizable by the agency and that public interest challenges to format changes are no longer considered. Applicants maintain that the obligation under the original 1976 agreement to operate a classical music format for five years has expired, and Guild's attempt to read such a commitment into the 1984 settlement is unsupported.

Applicants next assert that Guild's discrimination complaint is based on the affidavit of a former employee and speculation about the reason for his termination. Applicants argue that the Commission does not recognize such allegations of illegal activity until adjudication in an appropriate forum and cite Riverside Broadcasting Co. Inc., 53 RR 2d 1154 (1983), recon. denied, 56 RR 2d 618 (1984). Applicants argue that the Commission has previously determined that it is unnecessary to defer consideration of leveraged buyouts until stockholder approval, citing the Policy Statement in MM Docket No. 85-218, 59 RR 2d 1536 (1986). According to Applicants, the timing of the proposed buyout here provides ample time to consider the transfer of control prior to a stockholder vote. Applicants argue that to defer consideration would impose unnecessary burdens on them and the Commission and be contrary to the public interest. They assert that Guild's position in this regard is not mandated by the Communications Act of 1934, as amended, and that the transfer applications provide all information necessary for Commission consideration. Further, Applicants point out that, contrary to Guild's assertions, the officers and directors of Dorset are, in fact, specified in the transfer applications. Finally, Applicants urge rejection of Guild's contention that a grant would be premature given the possibility the transfer might not be consummated. Applicants assert that, under the Act, Commission approval must precede, but does not compel, consummation of a proposed transfer, and speculation as to whether the closing might actually occur does not justify denial or deferral.

Guild, in reply, points out that Applicants fail to proffer affidavits in support of their position that the format changes were contrary to their undertaking pursuant to the 1984 settlement agreement regarding renewal of the WNCN license. Specifically, it claims that the absence of music of various periods and types is inconsistent with that agreement and Applicants' representations to the Commission. It states that it is not seeking Commission enforcement of Applicants' format obligations. Rather, Guild states that it references the format obligations in the context of its

challenge of Heyman's fitness to control WNCN. Referencing the Commission's most recent policy statement, Guild argues that GAF's deceit of the Commission and the public is disqualifying. In this regard, Guild cites Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392 (D.C. Cir. 1985), for the proposition that a hearing would be appropriate if it is shown that prior to filing the 1984 settlement agreement the licensee had concealed from the Commission a planned format change.

Guild questions Applicants' reliance on Riverside, supra, asserting that it is not authority for the proposition that the Commission must await adjudication by another agency of employment discrimination allegations. According to Guild, in Riverside the Commission determined that since the allegations were speculative and conclusory as well as factually unsupported and rebutted by the licensee, there was no substantial and material question of fact, whereas here Applicants have not answered the charges which are supported by affidavit. Guild asserts that it is not certain that the specific discrimination charges here will ever be adjudicated and argues that a policy of not considering discrimination compliants prior to adverse adjudication does not protect the public from the deleterious effects on the licensee's broadcast operations.

60 FCC 2d at 865. [3] Further, insofar as citizens' agreements usurp a licensee's programming discretion, Commission enforcement is inappropriate. Riverside Broadcasting Co., Inc., supra. Accordingly, Guild's complaint in the area of format is limited to the issue of whether the licensee's actions otherwise disqualify it on grounds of character. Viewing Guild's assertions in their most favorable light, it cannot be determined that GAF Broadcasting under Heyman should be disqualified for misrepresenting its intention to maintain a classical music format. To disqualify an applicant for misrepresentation, there must be a reasonable degree of certainty that a deliberate misrepresentation has occurred. Service Electric Company, 86 FCC 2d 69, 93 (1981). Here, Guild references changes to the WNCN programming involving younger announcers, a different "pace and tone," the elimination of longer selections and vocal selections, a restricted play list and repetition of popular favorites, "looser" commercial standards, station promotions, "experiments" with new age and other non-classical programming, and the like. Thus, we conclude that these allegations in the petition fail to set forth "specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with the [public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1). See, e.g., Citizens For Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 394 (D.C. Cir. 1985). Further, since the petition fails to meet this first threshold requirement in the "statutorily prescribed process for the Commission's factual evaluation of challenges to broadcast licenses," there is no basis for an evidentiary hearing. Id. See also United States v. FCC, 652 F.2d 72, 90 (D.C. Cir. 1980). [4]

The Commission's most recent major statement of policy concerning general character qualifications is instructive regarding Guild's allegations of age-based employment discrimination. In its Report, Order and Policy Statement, Policy Regarding Character Qualifications In Broadcast Licensing, 102 FCC 2d 1179, recon. denied, 1 FCC Rcd 421 (1986) ("Character Qualifications"), the Commission clearly indicated that it will not take cognizance of non-FCC misconduct absent an ultimate adjudication by an appropriate trier of fact. The Commission set forth its general policy concerning equal employment opportunities in § 73.2080 of the Rules. Although Subsection (a) specifically prohibits broadcast licensees from discriminating on the basis of race, color,

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3 Although the parties differ as to whether the WNCN program changes constitute an abandonment of the classical music format, the Commission made it a point to note that formats may evolve over time and that it is extremely difficult to ascertain at what point a programming change amounts to a format change. This difficulty is one reason for its policy of not regulating station format.

4 Since the petition in this instance fails to meet the first threshold test under WRVR, there is no need to consider the second requirement, i.e., that the Commission must determine whether "on the basis of the application, the pleadings filed, or any other matters which [the Commission] may officially notice," "a substantial and material question of fact is presented under 47 U.S.C. § 309(d)(2)."

religion, natural origin, or sex, age is not listed and thus is treated as non-FCC misconduct. Thus, as with any non-FCC misconduct, the Commission will only consider the issue of age discrimination in the context of character qualification if a court or another government agency makes a determination. 102 FCC 2d at 1205. [5] Significantly, in the instant situation, Guild does not claim that the alleged incidents of discrimination were even brought before any judicial or administrative forum, much less decided therein. Had an appropriate forum determined that the licensee engaged in the unlawful

Guild's stated concern about fraudulent business practices by GAF, unlike age-based discrimination by GAF Broadcasting, have been adjudicated by appropriate forums. As noted in Guild's petition, the transfer application (Form 315) discloses four incidents of adverse actions against GAF detailed in Exhibit I-4. The first involved a 1981 jury verdict of $2.3 million, including $1.6 million in punitive damages, arising out of a defective roof on a school building. Applicants specify that this verdict was not premised on a finding of fraud, but apparently was based on a guilty finding of "malice" or

violative of the Act or Commission Rules and policies or specified non-FCC misconduct which demonstrates a proclivity to deal other than truthfully with the Commission or to comply with its Rules and policies. The cited incidents of GAF misconduct do not fall into any of the three designated categories of non-FCC misconduct of which the Commission will take cognizance in the context of GAF's basic character qualifications. [7]

Consideration of Applicants' transfer proposals at the present time is not inappropriate. The merger, or buyout, of GAF is conditioned on ultimate approval of the shareholders, which has not yet taken place. As set forth in the October 20, 1988 amendment, the merger agreement has been executed and endorsed by the board and will subsequently be submitted to the shareholders

broadcast licensees. A determination of the relevant issues does not constitute expedited treatment significantly inconsistent with Commission practices. Action herein is analogous to the procedure adopted in the Policy Statement only to the extent that it, like that procedure, avoids undue delay. Further, although the instant applications are "contingent" in the sense that the proposed transfers may not be consummated due to actions or decisions of the parties, they are not thereby different from "usual" or "typical" proposed tranfers. Thus, they are not within the purview of Section 73.3516 of the Rules regarding contingent applications.

The Commission recognizes that the proposed transfers, involving as they do a major corporate entity, constitute an extremely complex transaction. Further, the broadcast subsidiary constitutes but a minor part thereof. Accordingly, it would not be appropriate to postpone action on the captioned applications pending the shareholder ratification votes, thereby delaying settlement. Given the complexities, a delay could increase the risk that complications will arise which could adversely affect the interests of the parties to the proposed transfers without offsetting benefits to the public interest.

The Commission will not address the question of whether the proposed buyout complies with applicable corporate law. That issue has been mooted by the corporate action outlined in the October 20, 1988, amendment.

Finally, the Commission will not consider the financial impact, if any, of the buyout on the proposed transferee's ability or inclination to program WNCN. Guild's contention in this regard is speculative. Consistently, the Commission no longer generally inquires into the financial status of individual broadcast licensees. [9]

The above reflects a careful consideration of the pleadings and evidence submitted by the parties. Based on that consideration, the Commission concludes that no substantial and material question of fact has been presented which would warrant designation of the captioned applications for an

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9 See Amendment of Form 324, Annual Financial Report of Broadcast Stations, 51 RR 2d 135 (1982), wherein the Commission eliminated the requirement that broadcast licensees file annual financial reports.

evidentiary hearing or deferral of their consideration. [10] We also find that the applicants are fully qualified and that a grant of the captioned applications will serve the public interest, convenience, and necessity.

Accordingly, for the reasons set forth herein, the Petition to Deny the captioned applications submitted by Listeners' Guild, Inc. IS DENIED and the applications for consent to transfer of control, BTCH-880322GF and BTCH-880322GG, ARE GRANTED.

Sincerely,

Alex D. Felker, Chief
Mass Media Bureau

cc: Victor E. Ferrall, Jr., Esquire
Crowell & Moring

[redacted]

CERTIFICATE OF SERVICE

I, Deborah J. Hawkins, a secretary in the law firm of Cohen and Berfield, P.C., do hereby certify that on the 18th day of May, 1990, a copy of the foregoing, "Petition To Require Filing Of Early Renewal Application" was sent via first class mail, postage prepaid to the following offices:

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